IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1514 OF 2005
WITH
CIVIL APPLICATION NO.2158 OF 2005

Mahesh Vishnu Parab and ors. ..Appellants.
Vs.
Ganpat @ Ganesh Nhanu Puralkar and ors. ..Respondents.

Mr. P.G.Karande for the Appellants.

Mr.S.M.Raikar for the Respondent No.1.

Ms. U.K. Srivalkar i/by M/s. Consutta Juris for the respondent Nos. 2 and 3.

CORAM: S.C. DHARMADHIKARI, J.
DATE : 08TH AUGUST, 2007

P.C.

1. Heard Mr. Karande appearing for the appellants who are original defendants in the suit which was filed by some of the respondents for declaration of their share, partition and separate possession.

2. The suit was partly decreed but the plaintiffs aggrieved and dissatisfied with the partial decree filed an appeal before the Additional District Judge, Sindhudurga being Regular Civil Appeal No.3 of 2002 and the said appeal has been allowed.

3. Mr. Karande contents that the original defendant

Nos. 2 and 3 were in possession of land pursuant to an agreement for sale executed in their favour by the original Defendant No.1 who was Karta of the joint family. That agreement was binding on the parties to the suit and in any event the appellants being put in possession of the property in part performance of the agreement of sale, suit was rightly dismissed to the extent of the relief for possession. In such circumstances, substantial question of law arises as to whether the Trial Court's decree could have been reversed and the rights of the present appellants taken away by the Lower Appellate Court.

4. The Trial Court observed that the evidence is lacking not only with regard to the plea of possession but also whether the first defendant is a Karta of the family or not. The Trial Court observed that besides the oral statements of the Appellants there is absolutely nothing to show that the original defendant No.1 is a Karta of the Joint family of the plaintiffs and the defendant No.1. The extracts produced do not disclose the name of the defendant No.1 as Karta, further, the agreement has not been executed by the original defendant No.1 in his capacity as Karta of the joint family. When this material was available before the Trail Court on what count it refused relief of possession in the suit filed by the original plaintiffs

is not clear to me at all.

5. The suit was for declaration with consequential relief of perpetual injunction and the request made was that the defendants be restrained from obstructing the plaintiffs' possession.

6. That suit was partly decreed and the relief of possession was denied. To my mind, at the instance of the plaintiff, Lower Appellate Court was right in observing that the nature of the material placed before the Trial Court being such and parties being co- owners, relief of possession should have followed.

7. The points framed by the Lower Appellate Court indicates that it concurred with the Trial Court that the agreement for sale was executed in favour of the present appellants. That an agreement for sale was executed in favour of the present appellants but the same was not in the capacity as Karta. It held that the appellants are not entitled to protection under Section 53(a) of the Transfer of Property Act. Thus, it disbelieved the version of the Appellants and the finding in that behalf cannot be said to be perverse and based on no evidence. The suit could not therefore, have been dismissed partly is the conclusion of the Lower Appellate Court. There is no substantial question

of law but an attempt is made to reappreicate the evidence which is not permissible by law. However, the remedy of the present appellant is to seek damages or refund of monies paid to the defendant No.1 in their own substantive proceedings which are admittedly pending. Once Section-53A of the Transfer of Property Act is inapplicable on the basis that the plaintiffs to the present suit are claiming independent right, then, remedy of the present appellants in addition to claiming specific performance from the defendant No.1 is to claim damages in lieu thereof. That remedy is always open to be pursued. There is no merit in the second appeal and it is dismissed.

8. At the request of Shri. Karande and to enable the appellants to obtain appropriate relief in the pending suit including temporary orders, ad interim order granted earlier by this court to continue for a period of eight weeks from today.

9. In view of the dismissal of the second appeal, Civil Application No.2158 of 2005 does not survive. Civil Application is accordingly dismissed.

(S.C. DHARMADHIKARI, J.)